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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 540

CHARLES SCHILLER,

Petitioner,

v.

CHARLES LEFKOWITZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT

I. Petitioner's Constitutional Rights Were Infringed Under the Fourteenth Amendment 4

II. The Decision Below Is Based on Clearly Erroneous Interpretations of Decisions of This Court 5

CONCLUSION 8

APPENDIX A - OPINION . . . . . App. 1

TABLE OF CASES

Carpenter v. Wabash R. Co., 309 U.S. 23 (1940) 8

Crozier v. Krupp, 224 U.S. 290 (1912) 8

Dinsmore v. Southern Express Co., 183 U.S. 115 (1901) 8

England v. State Board of Medical Examiners, 375 U.S. 411 (1964) 6

Great Northern R. Co. v. Sunburst, 287 U.S. 358 (1932) 5, 6

Hays and Wainwright v. State, 240 Md. 482, 214 A.2d 573 (1965) 3

Linkletter v. Walker, 381 U.S. 618 (1965) 7

Mapp v. Ohio, 367 U.S. 643 (1961) 7

Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965) 3, 4, 5, 7

Smith v. State, 240 Md. 464, 214 A.2d 563 (1965) 3

State v. Madison, 240 Md. 265,
213 A.2d 880 (1965) 3

Torcaso v. Watkins, 367 U.S. 488 (1961) 4

Vandenbark v. Owens-Illinois Glass Co.,
311 U.S. 538 (1941) 8

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Your Petitioner prays that the United States Supreme Court issue a Writ of Certiorari to review the judgment of the Maryland Court of Appeals decided on May 11, 1966.

OPINIONS BELOW

The opinion in the Maryland Court of Appeals is reported in *Schiller v. Lefkowitz*, 242 Md. 461, 219 A.2d 378 (1966) (Appendix A, infra).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3); your Petitioner having been deprived of rights guaranteed to him through the due process of law

clause of the Fourteenth Amendment. The judgment of the Maryland Court of Appeals was entered on May 11, 1966 with the time for filing a Petition for Certiorari being extended by the order of Mr. Chief Justice Warren from August 8, 1966 to and including September 9, 1966.

QUESTIONS PRESENTED

1. May a State Court, without contravening the Due Process clause of the Fourteenth Amendment of the Federal Constitution, refuse to apply to the case before it a rule of Constitutional interpretation announced for the first time in that case?

2. May a State Court, without contravening the Due Process clause and Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, apply to pending criminal appeals but not to pending civil appeals, a new Constitutional doctrine that a trial in which jurors were required to swear to a belief in a Supreme Being, violates the Due Process clause of the Fourteenth Amendment of the Federal Constitution?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV: Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The Petitioner, an automobile personal injury Plaintiff, had his case tried in the Circuit Court for Montgomery County, Maryland by a jury whose members, as a condition to their service, were required to express indi-

vidually a belief in the existence of God. From this jury's adverse decision the Petitioner noted an appeal to the Maryland Court of Appeals claiming he had been prejudiced by the Trial Court's separation of the issue of liability from the issue of damages. While his appeal was pending, the Maryland Court of Appeals rendered several landmark decisions, *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965); *Hays and Wainwright v. State*, 240 Md. 482, 214 A.2d 573 (1965); *Smith v. State*, 240 Md. 464, 214 A.2d 563 (1965), which altered the Maryland law relating to the selection of juries.

For many years the practice has been widespread in Maryland for petit jurors to be questioned as to their belief in God as part of their oath. Any person who did not state a belief in God was automatically excluded from jury service. The Maryland Court of Appeals held in *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965), that an unconstitutional practice occurs when petit jurors are required to express a belief in God as a condition of their service. The Maryland Court of Appeals applied the *Schowgurow* decision to all pending appeals in criminal cases, *Hays and Wainwright v. State, supra.*

In reliance on these criminal cases, the Petitioner, with the permission of the Maryland Court of Appeals, seasonably amended his appellate brief and argued that the same principles of law which nullified the criminal proceedings applied with equal force to nullify the jury's verdict in a civil case.

The Maryland Court agreed with your Petitioner that the method of jury selection which *Schowgurow* held invalid in criminal cases was invalid as well in civil cases, although holding that the invalidity did not depend upon the nature of the litigation. The Court of Appeals, however, refused to apply its ruling to your Petitioner's case or to any other civil appeals pending at the time *Schowgurow* was decided.

Your Petitioner now requests that the Supreme Court of the United States review this decision, on the grounds that he has been deprived of rights guaranteed to him by the due process of law clause and the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Constitutional Rights Were Infringed Under the Fourteenth Amendment.

The Maryland Court of Appeals, on the basis of *Torcaso v. Watkins*, 367 U.S. 488 (1961), decided in *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965), that the exclusion of prospective jurors for failure to swear to a belief in God violated the First Amendment of the Federal Constitution as applied to the States through the Fourteenth Amendment. The Court further held that a Defendant in a criminal case was entitled to a jury drawn from a panel from which non-believers were not thus excluded. Therefore, the Court reversed Schowgurow's conviction.

The present case presented for the first time the question of the applicability of the *Schowgurow* rule to a civil case. In deciding the instant case the Maryland Court of Appeals held that a civil jury from which non-believers were excluded also violated the First Amendment as applied to the States through the Fourteenth Amendment, and that a civil litigant was similarly entitled to a jury drawn from a panel from which non-believers were not excluded. The Court of Appeals refused, however, to reverse the judgment of the trial court, despite its holding that the jury selection process was violative of the Petitioner's rights under the Fourteenth Amendment.

Therefore, by the very holding of the Court below, the Petitioner learns that he has been deprived of his prop-

erty without due process of law, but the Court below has refused to apply that holding so as to invalidate that unconstitutional deprivation, and by that act deprived the Petitioner of due process of law.

II.

The Decision Below Is Based on Clearly Erroneous Interpretations of Decisions of This Court.

A. The Maryland Court of Appeals contends that the Petitioner has asked that the rule of the *Schowgurow* case be applied retroactively to his case, and that it is under no obligation to do so. This view is erroneous, since the Court of Appeals itself found it necessary, in deciding the present case, to hold for the first time that the *Schowgurow* rule prohibiting exclusion of non-believers applied to civil juries as well as criminal juries.

The present decision therefore, announced a new rule of Constitutional interpretation, yet the Maryland Court of Appeals refused to apply that rule to the case before it. It is no more accurate to say that the Petitioner is seeking retroactive application of a new rule to his case than it would be to say that Schowgurow, a criminal defendant, was seeking retroactive application of the *Schowgurow* rule to *his* case. In essence the Maryland Court of Appeals has misinterpreted the doctrine of non-retroactivity as outlined in the decisions of this Court.

The Court below, by citing the case of *Great Northern R. Co. v. Sunburst*, 287 U.S. 358 (1932), attempted to find justification for this unusual abdication of a Court's responsibility of deciding the case before it according to its view of the correct applicable law. This decision does not support the action of the Maryland Court. In *Sunburst* Mr. Justice Cardozo held that a State Court was free, in its discretion, to apply a new rule of state law prospectively only, and that to do so would deprive a litigant of

his property without due process of law within the meaning of the Fourteenth Amendment.

However, in that decision, Mr. Justice Cardozo began his inquiry by determining whether the old rule of law, which the State Court was applying for the last time in that case, itself violated the due process clause of the Fourteenth Amendment. He found that the old rule was not unconstitutional, and then held that to change the rule only prospectively would not violate the Fourteenth Amendment.

The negative implication of the *Sunburst* opinion is clearly that, if the first inquiry revealed that the old rule of law was unconstitutional, the Supreme Court would have been required to reverse the decision of the State Court, without ever reaching the question of the validity of prospective overruling.

While a State Court in the matters of State law may apply a new rule only prospectively if it so chooses, it must apply the Federal Constitution rigorously to the case before it. If it finds that a feature of the trial below violated the Fourteenth Amendment it has no choice but to invalidate that trial. Therefore in the instant case, by refusing the new Constitutional rule, the Maryland Court of Appeals deprived the Petitioner of due process of law.

The only other case of this Court which involves prospective overruling, *England v. State Board of Medical Examiners*, 375 U.S. 411 (1964), involves a matter within the discretion of the court, and not a Constitutional rule. In *England*, this Court in its discretion decided not to apply to the detriment of a litigant, who relied on a former procedural doctrine, a new procedure rule that would have denied that litigant access to a Federal Court. There was no decision on an underlying Constitutional issue involved in that case.

B. Even if the Maryland Court's characterization of its decision is correct, and the present case is merely

an extension of the new *Schowgurow* doctrine rather than a new constitutional decision, the *Schowgurow* doctrine must be applied to all pending appeals and not merely to pending criminal appeals.

As the cases in this Court make clear, application of a new rule to cases still pending on appeal is distinguishable from allowing collateral attack on already final judgments on the basis of the new rule. In this case, contrary to the apparent view of the Maryland Court of Appeals, direct appellate review not collateral attack is involved, for the decision in the present case had not become final when the new rule of *Schowgurow* was first announced.

In fact, in the case of *Linkletter v. Walker*, 381 U.S. 618 (1965), upon which the Court below relies, this distinction is clearly drawn. Mr. Justice Clark, speaking for the Court after reviewing the authorities, states at page 627 that "a change in law *will be* given effect while a case is on direct review," (emphasis added) but that the "effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set principle of absolute retroactive invalidity." Having thus drawn the distinction between the automatic application of the new rule to cases pending on appeal and the absence of "absolute retroactive invalidity" on collateral attack, Mr. Justice Clark then goes on to hold that in *Linkletter*, a case of collateral attack, the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), would not be applied retroactively.

There is no justification for making a distinction between civil and criminal cases on the issue of retroactivity. In *Linkletter*, at page 627, Mr. Justice Clark states that the principles he has outlined apply with equal force to civil cases as well as criminal cases:

> "That no distinction was drawn between civil and criminal litigation is shown by the language used not only in United States v. Schooner Peggy, 1 Cranch 103 (1801), and Chicot County Drainage

District v. Baxtar State Bank, 308 U.S. 371 (1940), but also in such cases as State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940) and James v. United States, 366 U.S. 213 (1961)."

It is therefore well established under the decisions of this Court that a new rule of Constitutional law must be applied to all pending appeals in which it is properly raised, *Carpenter v. Wabash R. Co.*, 309 U.S. 23 (1940); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Dinsmore v. Southern Express Co.*, 183 U.S. 115 (1901); *Crozier v. Krupp*, 224 U.S. 290 (1912).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 129

September Term, 1965

* * *

Prescott, C.J.
Hammond
Horney
Marbury
Oppenheimer
McWilliams
Keating, Thomas J. Jr.
(specially assigned),

JJ.

Opinion by Oppenheimer, J.

Filed: May 11, 1966

The appellant's appeal from an adverse judgment in a civil jury case was pending when *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965) was decided. The jury which decided against the appellant, Schiller, in the Circuit Court for Montgomery County was composed of persons who were required, as a condition of their service, to swear to a belief in God. The appellant contends that under *Schowgurow* and subsequent decisions he was deprived of rights guaranteed to him by the Fourteenth Amendment to the federal Constitution and the Maryland Declaration of Rights, and is entitled to a new trial.

The appellant's suit was for personal injuries sustained as a result of the appellee's alleged negligence in the operation of his automobile. The appellant asked for a jury trial. His suit was filed on October 28, 1963 and came to trial on November 2, 1964. Immediately before the trial, at a bench conference, on the suggestion of the lower court and with the consent of the then attorneys for both parties, it was decided that the case be tried first as to liability and then as to damages. The jury, after hearing evidence only on the issue of liability, returned a verdict in favor of the appellee. The appellant's motion for a new trial was denied and judgment was entered for the appellee. The appellant's original counsel withdrew his appearance. The appeal was entered on February 24, 1965.

While the appeal was pending, *Schowgurow* was decided, on October 11, 1965. Thereafter, on motion duly made, this Court permitted the appellant to amend his original brief and to raise the additional questions as to the effect of *Schowgurow* and our subsequent decisions on his trial. In his amended brief, the appellant states that in Montgomery County (as is generally true in Maryland) jury panels for criminal and civil cases are selected from the same jury list, and that no distinction is made in the method of selection of jurors for civil and criminal cases. These facts are agreed to by the appellee. Neither in his amended brief nor in oral argument did the appellant claim actual prejudice; he contends that, under our decisions, prejudice is presumed. He does not contend that objection was made before or during the trial to the method under which the jury was selected, but, under *Hays and Wainwright v. State*, 240 Md. 482, 214 A.2d 573 (1965), failure to object, before *Schowgurow*, does not constitute a bar to the raising of the questions here involved.

The appellant's original ground for his appeal was that the trial court's separation of the issue of liability

from the issue of damage in a civil jury trial was not justified by the Maryland Rules, and, if it was, the court's action contravenes the Maryland Constitution. In his amended brief, the appellant contends that he was deprived of rights guaranteed to him by the federal Constitution and the Maryland Declaration of Rights by reason of the illegal exclusion from the jury of persons because of the nature of their beliefs about religion. We shall first consider the questions raised in the appellant's amended brief.

I

In *Schowgurow*, the Court held that because of the decision of the Supreme Court of the United States in *Torcaso v. Watkins*, 376 U.S. 488 (1961), reversing the decision of this Court, the provision of Article 36 of the Maryland Declaration of Rights requiring demonstration of belief in God as a qualification for service as a grand or petit juror was in violation of the Fourteenth Amendment to the United States Constitution. We held, further, that the decision was not to apply retroactively except for convictions which had not become final before rendition of our opinion. In *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965), the Court held that the indictment pending against the defendant when *Schowgurow* was decided, was voidable even though the defendant was a member of a faith which believed in the existence of a Supreme Being. *Smith v. State*, 240 Md. 464, 214 A.2d 563 (1965), held that criminal proceedings pending at the time *Schowgurow* was decided, in which the grand jury had been improperly selected, were voidable but not void, and that the defect could be knowingly and understandingly waived. In *Hays and Wainwright v. State, supra*, it was held that, in a criminal proceeding pending at the time of *Schowgurow*, when the conviction had not become final, the defendants were not barred, on appeal, from invoking the principle set forth by the change in law, and that, because at the time the grand jury had been selected, the law then in

effect had been a part of the Maryland Constitution for over a century, the failure of the defendants to object in the lower court was not a waiver of an existing right.

There can be no question but that the method of jury selection which Schowgurow held was invalid in criminal cases because of the Supreme Court's decision in *Torcaso* is equally invalid in civil cases. The invalidity stems from the First Amendment to the federal Constitution, made applicable to the states through the Fourteenth, and goes to the exclusion of prospective jurors because of the nature of their beliefs about religion in any trial, criminal or civil. The requirement is invalid as to the selection of the juries and the invalidity does not depend upon the nature of the litigation in which the juries serve. After *Schowgurow*, any jury chosen under the exclusionary procedure therein held improper would be illegally constituted and could be successfully challenged in any case, criminal or civil. The question before us is whether the *Schowgurow* principle is to be held retroactive as to a pending appeal of a civil case when the method of the jury's selection was not challenged and when no actual prejudice is alleged.

II

In *Schowgurow*, the Court considered the legal principles applicable to the prospective or retroactive effect to be given to a new ruling, reversing, because of a Supreme Court decision, what had been regarded as settled law. The opinion referred to *Linkletter v. Walker*, 381 U.S. 618 (1965), *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and other cases, and it was held that the proper administration of justice required that the legal principle enunciated in *Schowgurow* shall not apply retroactively, "except for convictions which had not become final before rendition of this opinion." See also *Hays and Wainwright v. State, supra*, at 486-88.

A decision changing pre-existing law can be made wholly prospective without application even to the case in which the change is announced. *Sunburst, supra*, at 364, and see *Linkletter*, 381 U.S. at 622 footnote 2 and 627-29.[1] In *Schowgurow*, this Court did not adopt the technique of purely prospective overruling. That technique, as has been pointed out in the authorities cited in footnote 1, makes an opinion only a prophecy instead of an adjudication, chills legitimate attacks upon existing law believed erroneous, and is unfair to the litigant whose initiative has brought about the change. However, the decision was made only prospective except as to the case itself and as to other convictions which had not then become final.

The exception set forth, in terms, applies only to pending criminal cases. We shall nevertheless consider whether, in the interest of the proper administration of justice or in general fairness, the exception should be extended to pending civil cases, and whether, in any event, the exception must be so extended because pending criminal and civil cases must be treated alike.

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[1] See also Comment Note - Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent - Federal Cases, 14 L. ed. 2d 992, 1001-02 (1966); Annot. Right of Court in Overruling Earlier Precedent to Apply New Rule Prospectively and Adhere to Old One as Regards Past Transaction, 85 A.L.R. 262 (1933); Levy, Realist Jurisprudence and Prospective Overruling, 109 U. of Pa. L. Rev. 1 (1960); Mishkin, The Supreme Court 1964 Term - Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Note, Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decision, 60 Harv. L. Rev. 437, 447-48 (1947); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 942-44 (1962).

III

It was pointed out in *Schowgurow*, 240 Md. at 134, that the decision as to the method of selection of the grand and petit juries "does not go to the fairness of the conduct of the trial - 'the very integrity of the fact-finding process.' *Linkletter* at 381 U.S. 639." That is equally true as to the pending case and as to all other civil jury cases whether finally adjudicated or pending at the time of *Schowgurow*. The defect goes to the method by which the jury was selected, not to the qualifications and competency of the jurors who served. *Smith v. State*, 240 Md. at 468.

From the point of view of the administration of justice, we see no reason why *Schowgurow* should be made retroactive in any respect as to civil cases. As *Linkletter* recognizes, and as was held in *Sunburst*, a civil case, retroactive operation of an overruling decision is neither required nor prohibited by any constitutional principle. Whether and to what extent a new rule adopted in an overruling decision will be given retroactive effect is a matter of judicial policy, to be determined in each case "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter*, 381 U.S at 629. As to the prior history of the exclusionary procedure held invalid in *Schowgurow* because of the Supreme Court's decision in Torcaso, the procedure embodied in our Declaration of Rights was in effect for more than a century and had been upheld by this Court. The purpose of its overruling, under the Supreme Court's decision, was to effectuate the intent of the First Amendment, made applicable to the states through the Fourteenth; that purpose is achieved through the mandatory requirement that the illegal exclusion in the selection of juries be abandoned in all trials, civil or criminal, after *Schowgurow*. Retroactive operation of the rule cannot further or retard its future application.

In *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11, 28-29, 163 N.E.2d 89 (1959), the plaintiff was injured in a school bus accident, and sued the school district for alleged negligence. The trial court gave the District a summary judgment on the ground of sovereign immunity, which had been the Illinois law for a long period. The intermediate court affirmed, but the Illinois Supreme Court overruled its prior decisions as to sovereign immunity and reversed. In so doing, the court denied retroactive application of its decision except as to the plaintiff in the case before it.[2] The court said that retrospective application of the decision might result in great hardship to school districts which had relied on prior decisions upholding the doctrine of tort immunity of such districts. Here, retroactive application would result in hardship to many parties who had received a verdict from competent and qualified juries and who would be forced to retry the cases (if their witnesses were still available) because of what was subsequently held to be a procedural defect in the method of jury selection. The Illinois court also said that, "if we were to merely announce the new rule without applying it here, such announcement would amount to mere *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it." Here, *Schowgurow* was not a dictum but a decision as to that case and the original challenge of the old rule was made by Schowgurow, not Schiller.

In *Chykirda v. Yanush*, 131 Conn. 563, 568-69, 41 A.2d

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[2] Molitor v. Kaneland Community Unit District No. 302, 24 Ill.2d 467, 182 N.E.2d 145 (1962) applied Molitor to other claims arising out of the same bus accident, on the ground that the earlier appeal was treated by the parties as a test case.

449 (1945), the Connecticut Supreme Court of Errors held that evidence must be offered as a basis for an award of punitive damages. In so holding, the court reversed its prior decisions on the question. However, in the case before it, the court refused to disturb the judgment, although the trial court, in accordance with previous decisions, had charged the jury that they were authorized to award punitive damages even in the absence of evidence to support the award. The appellate court said the case "affords us an opportunity definitely to abolish the practice of claiming such damages in the absence of evidence as to them." The holding, in view of the decision, was purely prospective. [3]

As this Court pointed out in *Madison*, 240 Md. at 271, *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), like *Schowgurow* and *Madison*, involved the effect of an improper exclusion from the jury list. *Thiel* was a civil case. In that case, the Court reversed a verdict for the respondent on the ground that the jury commissioners had improperly excluded from the jury lists all persons who worked for a daily wage. In *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450-51 (1948), another civil case pending when *Thiel* was decided, the petitioners contended that the jury panel in the case was selected contrary to *Thiel*.

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[3] In Mickel v. New England Coal & Coke Co., 132 Conn. 671, 677, 47 A.2d 187 (1946), the court applied a change made by it in a rule previously in effect or measuring damages in an action based on negligence to a case pending when the change was made. The opinion stated that the change involved went "beyond a mere procedural matter such as that before us in Chykirda v. Yanush."

Without commenting on the distinction made by the Connecticut court in the application of a change in preexisting law as between "procedural" and substantive matters, the change in preexisting law set forth in Schowgurow may be regarded as procedural in nature. See United States v. Gale, 109 U.S. 65, 70-71 (1883) discussed in Smith v. State, 240 Md. 464, 469-70, 214 A.2d 563 (1965).

Thiel was decided a few weeks after the verdict in *Francis*, and the objection was made for the first time in the motion for a new trial. The Court held the objection came too late. In *Thiel*, the Court acted in the exercise of its power over the administration of justice in the federal courts, and the question of retroactivity as to pending cases was not discussed in *Francis*, but the refusal to make *Thiel* applicable to pending cases is nevertheless pertinent. In this case, as in *Francis*, no question of the fairness of the trial is involved.

We find no constitutional or other reason to extend the *Schowgurow* exception as to non-retroactivity to pending civil cases, unless the fact that *Schowgurow* made the exception as to pending criminal cases of itself entitles the appellant and other persons in like circumstances to inclusion within it.

IV

A change in law will generally be given effect while a case is on direct review whether the litigation is criminal or civil. See *Linkletter*, 381 U.S. at 627 and cases therein cited. That principle does not mean, however, that in deciding whether a change in law is to be given retroactive effect as to cases other than the litigation in which the change is announced, the Court is not free to consider any substantial difference between the case before it and other pending cases. We must "weigh the merits and demerits in each case". *Linkletter* at 629. Specifically, we must determine, when the decision in the particular case rests in part on a presumption of prejudice to the defendant in a criminal case by reason of an improper method of choosing the grand and petit juries, whether it necessarily follows that there is the same presumption in a pending civil case.

In deciding whether a change of law is to be made retroactive in criminal cases, the Supreme Court has analyzed the nature of the change on a case to case basis. In

considering retroactivity in *Schowgurow*, we referred to the discussion in *Linkletter* of the differences between the right of an indigent defendant, on appeal, to a free transcript of his trial under *Griffin v. Illinois*, 351 U.S. 12 (1956), and to state-provided counsel at the time of his trial under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right of the defendant, under *Mapp v. Ohio*, 367 U.S. 643 (1961), in state criminal trials, to have evidence excluded which was seized in violation of the search and seizure provisions of the Fourth Amendment. *Linkletter* footnote 13, 381 U.S. at 628; *Schowgurow*, 240 Md. at 132-33. In *Tehan v. Shott*, 382 U.S. 406, 416-18 (1966), the Supreme Court held that its decision in *Griffin v. California*, 380 U.S. 609 (1965), that it was unconstitutional for a prosecutor or trial judge to make adverse comment upon a defendant's failure to testify in a state criminal trial [4] was not to be applied retroactively in cases in which the conviction had become final. In his opinion for the Court in *Tehan*, Mr. Justice Stewart said:

> "As to *Mapp*, therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent * * * * The same can surely be said of the wrongful use of a coerced confession * * * * By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth * * * *

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[4] In Maryland, such comment was forbidden long prior to Griffin v. California. Maryland Declaration of Rights, Art. 22, Code (1965 Repl. Vol.) Art. 35, Sec. 4, see Barber v. State, 191 Md. 555, 566, 62 A.2d 616 (1949).

> "There can be no doubt of the States' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in the utmost good faith * * * *
>
> "The last important factor considered by the Court in *Linkletter* was 'the effect on the administration of justice of a retrospective application of *Mapp*.' * * * A retrospective application of *Griffin v. California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*." [citations omitted].

The considerations of justice and public policy upon which the Supreme Court has relied in determining whether its various decisions making new law as to the rights of defendants in criminal cases are to be applied retroactively are, in our opinion, also applicable in determining whether the limited retroactivity of a decision which overturns previous law should be applied to civil as well as to criminal cases. The reasoning which makes the announcement of a change in law retroactive in some criminal cases and not retroactive in others, dependent upon the interests of justice in the particular kinds of cases involved, seems to us pertinent in deciding whether, in the interests of justice, a distinction is to be made in making a change of law applicable to various kinds of cases pending at the time of the decision. Here, the distinction involved is the fundamental one between civil and criminal cases. The question is whether the presumption of prejudice which we held applicable in pending criminal cases is also to be held applicable in pending civil litigation.

Litigants in civil matters are as much entitled to due process of law and all it implies as are defendants in criminal prosecutions. The constitutional guarantees apply alike to rights of life, liberty and property. But what the concepts of fairness embodied in due process of law entail necessarily varies with the nature of the litigation. The rights of civil adversaries do not encom-

pass all the protections guaranteed to defendants in criminal cases. In civil cases, the adversaries are generally private parties who stand in *pari passu;* in criminal matters, the power of the state, with all the resources of government, are pitted against the individual whose liberty or even life is at stake.

Accordingly, our law has evolved certain protections to defendants in criminal prosecutions which are not applicable to parties in civil litigation. In civil cases, the party who has the burden of proof on an issue must only persuade the trier of the facts that the preponderance of the evidence is on his side; in a criminal case, the State must prove that the defendant is guilty beyond a reasonable doubt. In a civil case, either party has the right to call his opponent to the stand; in a criminal prosecution, the State cannot force the defendant to testify against himself or comment on his failure to testify. The rights of indigent defendants in criminal prosecutions to court appointed counsel and to a free transcript of the proceedings on appeal are not accorded to indigent civil litigants. It is immaterial here whether these specific protections as well as others which apply only to criminal prosecutions are embedded in specific constitutional guarantees, or have become part of what today we consider due process of law by selective incorporation or have been made applicable to or absorbed into due process by development of the community's sense of justice. They reflect the practical endeavor of our processes of justice to give concrete meaning to the presumption of innocence in which every defendant in a criminal case stands armored. That presumption has no place in civil litigation, not because civil litigation is less important in our legal system or because the parties to it are not entitled to the fairness of procedure applicable to it, but simply because the presumption does not apply. [5]

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[5] " * * * The second distinction is between the right to liberty of person and other constitutional rights. Compare Phillips v.

In *Schowgurow*, the State contended that even though, as was held, an unconstitutional requirement had been imposed in the selection of the juries, the defendant had shown no prejudice and therefore, as to him, no denial of a constitutional right. This Court held, citing decisions of the Supreme Court, that it is the danger of abuse resulting from the method of selection which renders it unconstitutional, that the burden was upon the state to show that there was no exclusion or discrimination, and that the burden had not been met. It was the possibility of prejudice to a defendant in a criminal case, presumed to be innocent, which was determinative. In *Madison*, the

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Commissioner, 283 U.S. 589, 596-597. A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare Ng Pung Ho v. White, 259 U.S. 276, 282-285, with United States v. Ju Toy, 198 U.S. 253, and Tang Tun v. Edsell, 223 U.S. 673, 675. But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court; and that in deciding whether such review is required, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found suitable or admissible in the special case, it will be adjudged to the "due process of law."' Mr. Justice Bradley, in Davidson v. New Orleans, 96 U.S. 97, 107." St. Joseph Stock Yards v. United States, 298 U.S. 38, 77-78 (1936) - Concurring opinion of Brandeis, J.

" * * * [T]he quantum of proof necessary in most civil matters, usually involving the creation of only a monetary liability, is less than that required for the imposition of the sanctions of the criminal law. The difference is perhaps most readily explicable in terms of the impact of the respective findings. The personal impact upon the life of the individual from the imposition of criminal sanctions is of far more serious proportions than from the imposition of a civil liability. The impact upon society is likewise of a different order. The greater consequences for the security of society portended by the adminis-

Court referred to and distinguished decisions of the Supreme Court holding that the defendant must be a member of the excluded class in order to have standing to attack the method of jury selection, on the ground that in those cases the exclusion was not required by the basic law.[6] The opinion restated the reason for the holding that prejudice was presumed, as follows:

> "Where, as here, the unconstitutional discrimination is an integral part of the governing law, a defendant in a criminal case whose conviction has not become final is not required to show that he is prejudiced by the application of the law. Every person accused of crime has the right to be tried under what has been determined to be the law of the land. In *Schowgurow*, the State, as here, contended there had been no showing of actual prejudice. We held that where the system of jury selection on its face provides for illegal discrimination and exclusion, an actual showing of prejudice is unnecessary. It is the danger of abuse resulting from the method of selection which renders it unconstitutional. We pointed out that the exclusion of non-believers was not only authorized but demanded by the Maryland Constitution and that the resulting danger of abuse, under the decisions of the Supreme Court, obviates

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tration of the criminal law permit a lesser margin for error. The breakdown of a free society is more likely to arise out of the unpredictable enforcement of criminal penalties than out of a like unpredictability in determining the incidence of civil liability." Kadish, Methodology and Criteria in Due Process Adjudication - A Survey and Criticism, 66 Yale L.J. 319, 350 (1957).

"Of all cases presenting the question of retroactivity, those involving criminal law most clearly show when considerations of policy transcend the limitations of either the void ab initio doctrine or the principle of reliance. Because personal liberty is such an important interest, the granting or denial of retroactive operation is made to effect the protection of the person convicted of or charged with a crime." Note, 60 Harv. L. Rev. 437, 446.

[6] See, however, Chief Judge Thomsen's discussion of this question in Smith v. Brough, 248 F. Supp. 435, 441-42 (D. Md. 1965).

any need to show individual prejudice." *Madison*, 240 Md. at 268-69.

The "danger of abuse" referred to in *Schowgurow* and *Madison* is a concept which grows out of the presumption of innocence to which every defendant is entitled in a criminal case. In criminal cases, the protection of society is weighed against the protection of the rights of the individual. In balancing the scales, because of the presumption of innocence, the law weights the scales in the defendant's favor in the endeavor to avoid the conviction of the innocent. In that endeavor, it is necessary to guard against the danger of abuse, even when no actual abuse has been shown. The reason is the same as that which, in a criminal case, requires persuasion of the trier of the facts of the defendant's guilt beyond a reasonable doubt. If, because of the danger of abuse, the State is put to the inconvenience of a retrial, that is part of the price we pay for ordered liberty. The sovereign's interest in a criminal case "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It was the State, in *Schowgurow* and *Madison*, through its officials, which had enforced the improper requirement in the selection of the juries, and while the State was acting in accord with the Maryland Constitution and the prior decisions of this Court, it is fitting that the chance of danger of abuse should tip the scales against the State and in favor of the man it was prosecuting.

These considerations are not pertinent in a civil case. The State is not a party. The litigants stand on an equal footing. The defect in the method of the selection of the jury did not go to the fairness of the trial. Moreover, in a civil case, there are to be considered not only the rights of one individual party, but the rights of both parties. A civil litigant who received a verdict from a jury would be put to additional expense and would again have to face the uncertainties of litigation if a new trial is awarded because of a defect in the method of the selection of the jury, even though the jurors who heard the case were competent and

qualified and though the trial itself was fair. In a criminal prosecution, under our legal system, courts look primarily to whether the rights of the defendant have been properly safeguarded, but in a civil case, the rights of both of the private adversaries must be considered. To award a new trial in this case, because of the possibility of unproved prejudice to the appellant, would be unjust to the appellee. In a situation such as is here presented, due process does not demand that a civil case be treated like a criminal one. On the contrary, as the considerations of fairness applicable to a criminal prosecution led us to find there was a presumption of prejudice, so the concepts of fairness applicable to civil cases constrain us to find that, here, prejudice must be proved.

We find no violation of any constitutional right of the appellant under the Maryland Declaration of Rights or the federal Constitution in denying him retroactive application of *Schowgurow* and hold that the appellant is not entitled to a new trial because of the improper method of selection of the jury, whether under general legal principles in the administration of justice, or by reason of the exception made to non-retroactivity in *Schowgurow* as to pending criminal cases.

V

The original ground for the appellant's appeal goes to the separate trials of the issues of liability and damages ordered by the trial court under Maryland Rule 501(a). No objection was made to this order in the court below; indeed, both the attorneys then acting agreed to the procedure. We have consistently held that we will not consider or pass upon a question which was not raised in or passed upon by the court below. Maryland Rule 885; *Martin v. Mayor and Aldermen of Annapolis*, 240 Md. 579, 590, 214 A.2d 800 (1965). The question of the constitutionality of Rule 501(a) was not raised below. Even in criminal cases, a constitutional question can be waived. *Smith v. State*, 240 Md. at 480 and cases therein cited.

Nothing herein said is to be construed as implying that separate trials of the issues of liability and damages could not have been ordered under the Maryland Rule without the consent of the parties or their counsel, or that the rule may be invalid. These questions are not before us.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.